UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA : ATLANTA DIVISION

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UNITED STATES OF AMERICA

No. 1:91-Cr.078-01
(GET)

- against -

CHRISTOPHER DROGOUL, et al

Defendants.

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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS AMENDED MOTION TO DISMISS THE INDICTMENT ON THE BASIS OF OUTRAGEOUS GOVERNMENT CONDUCT AND FOR THE DISQUALIFICATION OF ASSISTANT UNITED STATES ATTORNEY GALE MCKENZIE

The defendant, Christopher P. Drogoul, by his attorneys, Robert M. Simels, P.C., submits this Memorandum Of Law in support of his amended motion to dismiss the indictment based on outrageous government conduct, and for the disqualification of Assistant United States Attorney Gale McKenzie.

We have thoroughly reviewed the response of the government in response to our motion to disqualify the Department of Justice from the prosecution of this indictment. In short, we are disturbed by the paucity of the submission, both in tone and in substance. We set forth extremely serious assertions in our motion, ranging from the impropriety of disclosing information to a target of an investigation and a formal legal adversary of the defendant, to the withholding of exculpatory information from the defense.

We averred that this case was urgently politicized by BNL-Rome, which steered the focus from the complicity of the bank to the individual culpability of Mr. Drogoul.

The tone of the government's submission throughout is one of casual annoyance, as if the facts set forth are merely a troublesome nuisance, instead of serious assertions of far-reaching impropriety. The claims in our motion go far beyond any documented attack on this prosection in any other forum; nonetheless the government's memorandum is a "cut and paste" amalgam of arguments previously submitted to Judge Frederick Lacey in conjunction with his thirty day "investigation" of the BNL affair. In some places the government has submitted verbatim recitations for the points made unilaterally to Judge Lacey.

Many of the facts set forth have gone without any response by the government. They make no reference to the entries quoted from the Divito memoranda[1], nor is there any express response to our assertion that they intentionally suppressed the information tendered by Paul Henderson.[2]

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[1] The translated version of these memoranda is fairly lengthy. We will be transmitting a photocopy for the court's review to follow this submission.

[2] There is, strangely, a footnote in the midst of an unrelated text, incorporating the government's Memorandum in Opposition to our motion to compel immunity for Mr. Henderson. However, in that submission, there is **no** explanation as to why Henderson's statements (both in 1991 and 1993) were not tendered to the defense as **Brady** material. The government claims that Henderson had no **first hand** information as to BNL's complicity, that he had been told **only** by "co-conspirators". This is a specious and manipulative view of the **Brady** obligation. Certainly, at the time Henderson was interviewed, there were no co-conspirators, since the indictment did not yet exist. In

Many of our arguments seem to have been intentionally misconstrued, or else the government attorneys lack the sophistication for which they have always received our credit.

In one serious regard however, we are in accord with the government. The statute governing the appointment of an "independent counsel", 28 U.S.C.A. § 591, et. seq. has clearly expired. At the time of our original submission, we assumed that Congressional re-enactment was imminent. The passage of the extension of the statute, however likely, remains uncertain. While this does nothing to lessen the vitality of our motion, it does reduce the relief available to us.

Therefore, we are amending our motion to reflect the unavailability of a means for the appointment of independent counsel. Pursuant to the guarantees of due process, and seeking the exercise of the court's supervisory authority, we are moving to dismiss this indictment based on the government's outrageous conduct, or, in the alternative, set this motion down for a hearing on the allegations contained herein.

A. The Government's Improper Relationship With BNL-Rome.

The government has expended considerable verbiage detailing the testimony of Paul Von Wedel and Jean Ivey to document their 1992

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addition, there is no limitation to facially exculpatory material simply because the government doesn't believe it, or considers it inadmissible.

conclusions that they had no first-hand information that anyone at BNL-Rome was aware of their activities. This is quite beside the point. We alluded to this testimony only for the purpose of evincing what these mainstays of the government case told investigators in August, 1989. At the risk of redundancy, we submit that while Atlanta prosecutors were divulging material information to the attorneys for BNL, at least three officers of the bank (Ivey, Von Wedel and Barden) had opined that it was difficult to believe that no one in Rome knew. This was not offered for its final substantive merit, but for the proposition that since these major actors had difficulty with the concept of Rome's avowed ignorance, it is distressing that government investigators discounted BNL complicity from the outset.

As we predicted, the government has interposed that the presence of BNL officials and lawyers at the defendant's August 10-11 interrogations was attributable to Drogoul. Again, this is immaterial. As agent Hardy testified "[I] wanted to see if I could get the story of what had happened, and I knew that we were going to face a long, hard investigation..." (Transcript of April 27, 1992 proceeding, p. 35-36). It is clear from agent Hardy's testimony that he did not know the scope and extent of BNL-Atlanta's activities, nor whether BNL-Rome was aware of or had authorized Drogoul's activities. It is simply unfathomable that, Drogoul's requests notwithstanding, the government would allow a potential defendant to participate in these interviews.

Even if the impropriety of the August 10 meeting can be dispelled by the "it was his idea" theory, this cannot explain what followed. For example, it was not the defendant's idea to have Bruce Kirwan meet with McKenzie, et al, to discuss the various "inconsistencies" in Mr. Drogoul accounts, or to disclose to the bank the substance of statements for which they were not present, and which inculpated officials in Rome. On September 11, 1993, at a meeting between members of the Task Force and the defendant, he expressly named individuals at BNL-Rome who either knew of his activities or authorized his actions. Specifically, Drogoul alluded to "Pecore', who "knew early on that BNL was using extinct credit lines to fiance other business." (Notes of Federal Reserve Bank Examiner Bill Estes). He also alluded to "Alvisi" who said "overlines didn't matter -- he could move things under his authorization." (Id.). Drogoul told the investigators on September 11 that "Amedeo [Decarolis] would get other calls from other branches - directed by Ted Monaco to contact Atlanta if [sic] wanted to do business with Iraqis". (Notes of Federal Reserve Bank Examiner Robert Kennedy). This meeting was also the occasion upon which Drogoul detailed his relationship with Ted Monaco, and the latter's involvement in the Danielli transaction.

Certainly, at this juncture, thirty days after the raid at BNL-Atlanta, without having interviewed Monaco, Alvisi or Pecora, the government had no reason to dismiss the information related to them by Drogoul, imputing knowledge and complicity to officials of the bank. It is therefore

incomprehensible that four days later, this information would be relayed to the very persons whom Drogoul was inculpating.

1. The Government's Response

The government's response to the lengthy chronology of instances of information leaked to BNL-Rome, and the express and immediate bent away from the culpability of the bank is worth quoting at length:

> While it is true that AUSA McKenzie and the BNL Task Force held the preliminary view, based on the evidence uncovered early in the investigation, that there was insufficient evidence to indict BNL-Rome, the Task Force, with the complete support and encouragement of career prosecutors in Washington, actively sought to uncover and thoroughly review any evidence that might have implicated BNL-Rome and its officers.
>
> Defendant tries to make much of AUSA Gale McKenzie's meetings with BNL lawyers discussing the bank's position as a victim. Defendant suggests that these meetings and other discussions are evidence of an improper relationship between BNL-Rome and AUSA Gale McKenzie, and that [McKenzie] was somehow deterred from conducting a thorough investigation of BNL-Rome. This is simply not true.
>
> As an initial matter, the Task Force was actively seeking information about possible wrongdoing by BNL-Rome and its managers during that time. More importantly, the Task Force continued (and continues) investigating higher-ups in BNL-Rome for possible complicity. Of equal importance is the fact that at no time did counsel for BNL-Rome seek immunity for anyone.

(government memorandum in opposition, p. 16-17, emphasis added).

This resounding denial is a remarkable statement. For one, it is noticeably devoid of any but the most shadowy substance. As such, its conclusory form is hardly a response to the detailed assertions[3] contained in our motion. More importantly, it is categorically and wholly untrue.

a. The "Insufficient Evidence" Claim

It is not uncommon to conclude that an investigation of criminality on the part of an individual or entity comes up short of evidence sufficient to indict. This is of course distinct from a prosecutorial conviction of the target's innocence. It is the former which the government maintains was the operative climate of their investigation from August 1989 through the present. Yet the tone and substance of the government's communications during this period belie any such notion.

In January, 1990, in a letter to the Federal Reserve Bank, McKenzie reported her intention to travel to Rome to gain access to records "which will defeat the **spurious claims** by subjects of our criminal investigation." This assessment was written four months **after** Drogoul had named Monaco, Alvisi and Pecora; **none** of these individuals had been interviewed

[3] The government makes **no** reference to the disclosures by Paolo Divito of the information leaked to the bank by the government. It is perhaps significant that Mr. Divito was a witness whom the government placed before the grand jury. Apparently his general credibility was such that the government did not hesitate to submit his account to the grand jurors. It is thus understandable that the government has sought to neither controvert nor minimize his officially recorded account of the events surrounding the BNL "investigation".

in the interim. Such fervor is hardly resonant of the open-minded pursuit of evidence which the government now claims was their goal.

Similarly, one month later, on February 8, McKenzie and Wade met with Paolo Divito at the offices of King & Spalding. According to Divito:

> [t]he investigating attorney proceeded to verify a series of elements with the **principal aim of solidifying BNL's role as victim in the affair**, and to **confute the expected charges against BNL** from Drogouls' defenders...The impression was that the Assistant U.S. Attorney subscribed in the **broadest way to the BNL positions and is trying to support them point by point**.

(Divito Diary, I-91-92))(emphasis added).

The government **now** asserts that the "Task Force continued...investigating higher-ups in BNL-Rome for possible complcity." We are left to wonder where the Task Force found the time to carry out this investigation, since "solidifying BNL'S role as victim" and defeating "spurious" claims must surely have consumed both time and energy.

Further, the reports of other agencies demonstrate the unjustifiable aspect to McKenzie's posture. In November, 1989 she reported to United States Attorney Barr that there "is **no evidence** that any BNL employee or officer outside Atlanta had knowledge of any portion of the scheme..." (Memorandum from Gale McKenzie to Robert L. Barr, November 22, 1989). Three months earlier, on August 31, 1989, the Federal Reserve Bank, with whom the BNL Task Force worked closely, drew the following

conclusions in their Uniform Report of Examination For Branches And Agencies Of Foreign Banking Organizations:

> The overall condition of Agency at the examination date was unsatisfactory based upon the condition of its risk assets, internal controls, and management function. The examination revealed material deficiencies in parent bank supervision and internal controls.
>
> It is abundantly clear that the parent's bank policies were systematically ignored by Agency's management, and inadequate internal controls, audit and parent bank supervision allowed this situation to continue for several years. The events at Agency have revealed the extent of inadequate management and controls of the parent bank.

(Uniform Report, p. 2, emphasis added).

While this portion of the Report depicts, at the very least, images of gross negligence or conscious avoidance by BNL-Rome, other segments of the review intimate complicity by the parent bank.

> While the Banca d'Italia examination report has not yet been released, indications are that BNL's internal controls are largely to blame for the unreported transactions...Also, it alleges that BNL officials in Rome and around the world were knowledgeable of and participated in these transactions. Ex-officers Drogoul and Von Wedel told U.S. government investigators of numerous instances where other BNL offices, including Rome, had knowledge or should have known about some of the unreported transactions. Examiners have reviewed some files that seem to corroborate these statements.

(Uniform Report, p. 23, emphasis added).

While the Federal Reserve Examiners were busy documenting these findings, Ms. McKenzie was cementing her conclusions that the statements of Drogoul and Von Wedel were "spurious". It is an astounding, but revealing aspect of the Task Force's investigation, that McKenzie **did not read this report until March of 1990, seven months after its issuance**. (Divito Diary, I-123).

b. The "Investigative Meetings With BNL-Rome" Claim

We are asked to accept that the meetings between McKenzie and the lawyers and officials of BNL-Rome was nothing more than the eager pursuit of the truth of the BNL affair. Once again, the government misses the point. It is not so much the fact of the meetings and discussions as the information being divulged by the government, dissipating even the illusion of investigative integrity. The entries recorded by Paolo Divito effectively undermine any suggestion that these discussions were innocuous or designed to elicit information from BNL. During the course of this "thorough investigation of BNL-Rome", the government disclosed to representatives of the bank:

1. its prosecution posture relating to the Iraqis (I-23);

2. the internal state of the multi-agency investigations (I-50);

3. the defendant's strategic posture with regard to inculpating mei. ers of the bank (-52);

4. Drogoul's defense strategy communicated by Williams & Connolly to Gale McKenzie (I-90);

5. Drogoul's revelation regarding his meeting in Baghdad with Ted Monaco.[4] (I-104);

6. The defendant's initial interest in a plea bargain (I-105);

7. the temporary shift in status from victim to target after DOJ officials expressed reservations[5]

8. the details of the meetings between McKenzie and the Justice officials, including the nature of their reservations (I-122);

9. McKenzie's opinions after reading the report of the Federal Reserve Bank(I-123);

10. Drogoul's relationship with his attorneys (II-8);

11. The shift of BNL back from target to victim, although this was not the articulated position of the Department of Justice(II-65).

It is clear that the Task Force had allied itself with the bank from the outset.

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[4] Rather than merely interviewing Monaco as to this meeting, McKenzie previewed her interest, which resulted in a meeting of bank officials "to reconstruct with Monaco, Bertoni and DiNisio the chronology of the meeting in Baghdad in February 1988.

[5] As we set forth in our original motion, this impelled a flurry of political activity designed to raise the investigation to "a political level". This included visits by Prime Minister Andreotti and Ambassador Petrignani to the highest echelon of the Executive Branch, including President Bush, Attorney General Thornburgh, State Department Legal Counsel Abraham Sofaer, the Chief of Staff at main Justice, Robin Ross, the DOJ head of the Criminal Division Edward Dennis, head of the DOJ International Affairs division, Mark Richard, the American Ambassador to Rome, Peter Secchia and the Economic Attache to the American embassy, Daniel Serwer. See discussion at p. 20, infra.

even when representatives of main Justice and the Federal Reserve Bank were considering BNL either grossly negligent or potentially culpable. It is equally apparent that, if they are indeed complicit, these "leaks" allowed BNL to "cover their tracks" and undermine the investigative efforts of those agencies who were not so convinced of their "victim" status.

c. The "No Immunity" Claim

The government thinks it compelling that "at no time did counsel for BNL-Rome seek immunity for anyone." (government memorandum, p. 17). Given the information being leaked to them from McKenzie through Kirwan and Walter Driver, the notion of immunity could never have occurred to either the attorneys or their clients. On December 15, 1989, four months after the raid on BNL, Bruce Kirwan and Walter Driver met with Gale McKenzie. Their report to Paolo Divito inspired him to record that "no one is implicated outside Atlanta." (Divito Diary, p. I-22). Armed with such compelling inside information, no respectable attorney would seek immunity for his client. Similarly, on February 22, 1990, Kirwan again communicated with Divito and "confirmed categorically the solidity of our line and her [McKenzie's] pro-BNL persuasion." (Divito Diary, I-105). Certainly, as far as the attorneys and BNL officials were concerned, they had already received de facto "immunity" from Gale McKenzie and her colleagues.

Finally, as the critical moment for the 1991 grand jury

presentation arrived, the absence of any need for immunity was dramatically reaffirmed. At a pre-testimony meeting between Divito and Walter Driver, the BNL official was told that "it will be made clear to them [the BNL witnesses] that they are not targets, but witnesses for the prosecution." (Divito Diary, p. V-15, emphasis added).

2. The Entrade Lawsuit

At an early stage, the investigation of the Task Force focused on the role of Entrade International, and its principal, Yavuz Tezeller.[6] Allegedly, Entrade was a key figure in the lendings to Iraq under the C.C.C. program. In addition, the government has charged that Entrade was the means by which Drogoul laundered the proceeds of the scheme to defraud, and which paid bribes and "kickbacks" to Drogoul and Paul Von Wedel.

During the pendency of the criminal investigation, the attorneys for BNL adopted a strategy of suing those persons identified as the key figures in the criminal scheme. As noted, in October, 1989, the bank commenced a civil RICO lawsuit against Drogoul and Von Wedel. Similar action was contemplated against Entrade; BNL reluctance was predicated upon political and financial concerns. However, in February, 1991, on the eve of the grand jury presentation, Paolo Divito recorded the following:

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[6] A Federal Reserve Bank Memorandum, dated September 22, 1989, quoted McKenzie as stating that the BNL-Entrade relationship is a "big deal."

> We continued to work on the lawsuits with our attorney especially one against Entrade. **The Assistant U.S. Attorney strongly suggested it some time ago and it just cannot be put off anymore**.

(Divito Diary, V-24).

We cannot conceive of a definition of prosecutorial propriety which includes the counselling of a "once and future" target to bring a civil lawsuit against another potential defendant, particularly where the case is in a pre-indictment posture. The basis for McKenzie's improper intermeddling was starkly memorialized by Divito on February 8, 1991:

> In the afternoon, our attorneys filed the suit against Entrade International in U.S. District Court in Atlanta. As mentioned, this initiative was **strongly advised by the Assistant U.S. Attorney, it complemented her thesis in the grand jury investigation**. We thought we would make it coincide with the grand jury indictment, but the continued postponements made it advisable to go ahead with the lawsuit. **A suit against Entrade reaffirms the bank's condition as a victim of the fraud**.

(Divito Diary, V-25).

The government maintains that it was exhaustively investigating every lead to BNL-Rome complicity, presumably up through the time of the indictment. It is difficult to explain, even from the most cynical perspective, why the lead prosecutor for the chief investigative organ was giving **civil** counsel to a criminal target, furthering its self-serving efforts to concretize its "innocence".

B. The Appointment of Joe Whitley As United States Attorney For The Northern District of Georgia

On June 1, 1990, Joe Whitley was sworn in as acting United States Attorney for the Northern District of Georgia, appointed by Attorney General Thornburgh. Immediately prior, he had been a partner at the law firm of Smith, Gambrell & Russell in Atlanta. In that capacity, he had been directly involved with the representation of Matrix-Churchill[7], both in their negotiations with BNL-Rome, and as a potential target of the criminal investigation.[8]

The posture of Matrix Churchill's relationship with BNL consisted of demands for payment that were not being met. Ostensibly, given the bank's claims that the loans to Matrix Churchill were unauthorized, they

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[7] Matrix Churchill Ltd. was the British tool manufacturing company owned by Iraqis, which reportedly was at the center of the arms procurement network. The General Manger for that company was Paul Henderson, who during the late 1980's was providing intelligence information to the British government.

The American subsidiary, Matrix Churchill Corporation was involved in a series of transactions for exports of dual use technology. Both companies had several letters of credit financed by BNL-Atlanta.

[8] Even in the context of Matrix Churchill's role, Gale McKenzie's name appears as a fertile source of information. During a November 10, 1989 meeting amongst the principals and lawyers for Matrix Churchill, at which Joe Whitley, John Latham, and Ken Milwood were present, Whitley is quoted as saying "U.S. Attorney firmly believes Drogoul would never have taken risks without a payoff." Similarly, John Latham reported that McKenzie bragged that she "has the convictions of Drogoul & [sic] Wedel –in the bank', but she is trying to find what else she can establish." However, most revealing is Latham's observation that "[w]e are trying to 'go around' U.S. Attorney to **sway her opinion** because of her **own personal beliefs** because she has no appreciation of how the world works. (These statements are taken from notes of the meeting recorded by an attorney who was present.)

were raising this as a possible bar to their payment obligation. Of course, any information possessed by the company that BNL **had** authorized the loans would have been markedly advantageous in the negotiations.

In October, 1989, representatives of Smith, Gambrell & Russell met with Paul Henderson in Coventry, England, to discuss the pending investigation. We have every reason to believe that Henderson told the companies lawyers what he has been saying from the outset: that Safa Al Habobi had told him the transactions were all authorized by BNL-Rome, and that the secret nature of the loans was connected to the Italian-Iraqi disagreement regarding the Fincantieri frigates.

In December, 1989, **after** the lawyers' meeting with Henderson, Paolo Divito recorded

> ...we received from Mr. Driver a copy of an exchange of letters with the attorney for Matrix Churchill, Ltd., which presented documents and threatened to sue us if we did not pay...
>
> The contents and implications of the Carli[9] report to the Senate last Thursday were mentioned clearly at the end of the letter from Matrix Churchill...

(Divito Diary, I-30)

It is clear that the attorneys for Matrix Churchill were brandishing the sword of Rome's complicity as a means to obtain payment under the Atlanta letters

[9] Carli was the Italian Treasury Minister who reported to the Italian Senate that officials of BNL-Rome were aware of and authorized the Iraqi loans.

of credit. This was,of course, contradistinct to the position of the United States Attorney's office, that BNL-Rome was the ignorant victim of Drogoul's machinations.

It is therefore extremely curious and disconcerting that Attorney General Thornburgh chose Joe Whitley, of all available candidates, to be the titular head of the office which was investigating his client, among others. The distressing aspect to this choice is dramatized by the timing of the choice. As we have previously discussed, and reiterate again below, the atmosphere surrounding the investigation was politically highly-charged. The Iraqis and American exporters and farm consortiums were all exerting tremendous pressure for quick approval of the 1990 C.C.C. credits to Iraq. As Under-secretary of State Richard McCormack wrote in an October 11, 1989 memorandum, "the unfolding BNL scandal is directly involved with the Iraqi CCC program and cannot be separate from it." The Italian government saw disaster in an indictment naming the state-owned BNL, and Prime Minster Andreotti and Ambassador Petrignani were seemingly meeting with everyone in the Executive Branch. The first hints that the Iraqis may have used BNL money to further their military and nuclear arsenals were coming to light.

In the midst of this volatile situation, the choice of a lawyer who represented one of the targets of the investigation, and the key entity in the suspected procurement network was an oddity of grotesque proportion.

The government may well respond that Whitley recused himself,

and had no involvement in the BNL investigation or prosecution.[10] Indeed, by all public accounts, Whitley orally recused himself on June 1, 1990, and formally did so on June 8, 1990. Counsel, and all others for whom such matters were of substantive concern, have always accepted these assertions at face value. However, we have recently come into possession of documents which call Whitley's role into serious question, and again undermine any illusion of the integrity of the BNL investigation. The first such document is a memo from Peter Clark, dated September 21, 1990. This memo was prepared **three months after** the purported recusal of mr. Whitley. The memorandum also evokes Gale McKenzie's **modus operandi** during her "investigation".

> Tom Reinhart called late yesterday and asked if I knew anything about BNL. I naturally asked "why" and learned that he had received a message from MMR [Mark Richard of DOJ] saying that Mark was on his way to Texas, but wanted to speak with Tom about a problem involving some Congressional staffers who were on their way to Atlanta to interview "witnesses" in the BNL matter. He mentioned that the AUSA, presumably Ms. McKenzie, **responsible for the case wanted to warn the witnesses not to speak with the staffers**...to the extent we...are involved, I suggest that word be conveyed to Gale that under no circumstances do we advise, suggest or imply to witnesses that they refuse to talk to anyone. If we have a valid reason to ask Congress to refrain from acting in a particular investigation, we tell

[10] A reasonable person might thus ask: if Whitley was to have no role in the single largest and most complex criminal matter in the office, why was he chosen?

> the staff directly, and never try to block their investigation by chilling witnesses. If she talks to those witnesses, the Congressional lead will be too hot for any but robots to handle.
>
> I thought that the USAO was under control now that Joe Whitley is in place?

(emphasis added)

Apart from its references to McKenzie's efforts at obstructing the Congressional investigation[11], Clark's reference to Whitley's "control" over a case from which he was formally recused is chilling in its implication.

Any possibly innocent interpretation to Clark's concluding line is vitiated by another memorandum, also authored by Clark, dated July 18, 1991, more than a year after Whitley's "recusal". The document memorialized a telephone conversation between McKenzie and Clark focused on the production of documents to the State Department. Clark then wrote:

> I asked about recusal. She said at first Joe was not going to recuse himself, but then indicated that the materials she had received from the Fed showed a $50,000 fee paid by BCCI/NBG? to his former law firm while he was still there. Is suggested that she or Gerrilyn bring this to Joe's attention ASAP. So far as I am concerned, the jury's still out on his recusal.

(emphasis added).

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[11] Five days after this memoranda,Attorney General Thornburgh wrote to Congressman Henry Gonzalez in an effort to compel him to discontinue the hearings of the House Banking and Finance Committee, citing concerns of "national security".

It is therefore unremittingly clear that as far as Clark and McKenzie were concerned, as of July, 1991, Whitley's June 1990 recusal was illusory at best, if not an outright fabrication.[12]

The ethical quagmire of this situation is apparent. We believe that Paul Henderson told his lawyers what he told Gale McKenzie in 1991 and 1993, and related to this office two months ago: that the principal of Matrix Churchill, Safa Al Habobi, told him that BNL-Rome was fully aware of Drogoul's transactions with Iraq. Since Whitley was representing Matrix Churchill at the time, this information would have been, and would remain, privileged. Therefore, as a presumably ethical attorney, Whitley could not disclose this information to anyone in the United States Attorney's office.

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[12] A February 23, 1991 memorandum from AUSA Amy D. Levin to Whitley substantiates this conviction.

> Several months ago I discussed with Ray the matter of your recusal from the BNL case. Attached is a copy of the Section 1-3.170 of the U.S. Attorney's Manual.
>
> As you will note, since you have decided that your past representation requires your recusal, 1-3.170 provides that you are to contact (if you haven't already done so) the **Criminal Division** of DOJ and **Legal Counsel of the Executive Office**. The Criminal Division may assume responsibility of the case, or secure the designation of a Special Attorney or Special Assistant to the Attorney General. That wouldn't happen here, since the entire office wouldn't be conflicted out, but the Criminal Division has the final word.

The import of this memo, when considered in conjunction with Clark's memoranda, is that Whitley's recusal was little more than a rumor, and had certainly not risen to any official status until well after the indictment in this case, an indictment for which Matrix Churchill was conspicuously absent.

However, this unfortunate dilemma would not have relieved Whitley of his obligation to disclose this exculpatory evidence so it could be furnished to the defense.

Moreover, Whitley's privileged knowledge of the details of Matrix Churchill's operations made an objective investigation of that entity impossible. Indeed, despite the clear evidence of the link between both companies and Iraq, and the assertion that the Iraqis knew of Drogoul's fraud, and documentary proof that Matrix Churchill was charging illegal brokering fees for subcontracts, neither of the two companies was indicted. In a remarkable piece of legal flim-flammery, the government posited that

> MCC was not indicted primarily because that corporation, which was Iraq-controlled at the time of the Iraq trade embargo, had its assets frozen by the office of Foreign Assets Control (OFAC)...Thus, at the time of the indictment, the entity itself was not operating, and all of its assets already were frozen by the U.S. government.

(Lacey Report, Appendix, Volume 1, p. 89)

We are unaware of any prosecutorial policy which predicates the decision to indict upon the liquidity of a corporate entity. Both Mr. Drogoul and Paul Von Wedel were absolutely destitute by the time of the indictment, with no assets against which to satisfy a post-conviction forfeiture order. Similarly, Tezeller, Habobi, Taha, Rasheed and Ali were beyond the court's jurisdiction at the time of the indictment, with no legitimate expectation that they would

ever surface. None of these factors deterred the indictment of any one of those defendants, making it questionable whether fiscal concerns were the dispositive element in the decision not to indict Joe Whitley's client.

C. The Politicization Of The Investigation

We asserted in our original moving papers that the information divulged by the government investigators to BNL-Rome unleashed a torrent of political activity on the part of Italian governmental representatives. The seeming sole purpose of these political pressures, exacted at the upper echelons of the Executive Branch, was to prevent the indictment of any representatives of BNL-Rome. We have asserted, and continue to assert, that this political gambit succeeded, to the ultimate detriment of the defendant.[13]

To these most serious of charges, the government has, in forma verbatim, reiterated the statement made to Judge Lacey:

> No doubt, BNL-Rome, a powerful banking establishment that is owned by the Italian government, was concerned about its image, how the Justice Department perceived its role in this elaborate scheme, and what the repercussions might be to its business in the event of an indict-

[13] We submit that the adherence to the evidence of BNL complicity would have resulted in no indictment at all. Since the indictment as it is presently constituted revolves centrally around the alleged scheme to defraud the bank, BNL knowledge and authorization would obviate all but the "regulatory" counts. Indeed, the evidence of BNL's involvement would not have led to an indictment of the bank, but produced "serious reservations over charging the defendants [Drogoul, et al.] with fraud against BNL." (Department of Justice Memorandum form Peter Clark to Theodore Greenberg, dated February 12, 1991).

> ment. It is also true that, given is prominence as the largest bank in Italy, BNL-Rome may have access to high-ranking officials within the government. These circumstances alone, however, do not establish that [sic] if pressure was applied on the BNL Task Force to alter its investigation and prosecutive decisions, or that the BNL Task Force [sic] were denied access to the information it needed to thoroughly conduct its investigation.

(government memorandum in opposition, p. 22).

This statement is the paradigm of understatement. The government suggests that some general discussion was had between some BNL officials and a couple of "high ranking officials within the government", because BNL was "concerned about its image". If the evidence were not so stark, and the issues so dramatic, this casual denial would be laughable. To emphasize the clarity of the pattern of political maneuvering, we have included an excerpt of the chronology prepared and annexed to our original motion, covering the three month period between March 5, 1990, and June 1, 1990.

As is readily apparent, the frenetic activity began with McKenzie's disclosure to Bruce Kirwan that her well-documented inclination to protect the bank was being undermined by officials at main Justice. Seemingly within moments of this revelation, the Italian Prime Minister flew to Washington and met with President Bush **and** Attorney General Thornburgh. Even the simplest naif would not believe that these discussions dealt exclusively with BNL's "image". Thus began a flurry of activity in the Executive Branch, including representatives from the National Security

Council and the White House.

3/5/90 **Divito:** Kirwan calls - the call from the Justice Department which **should have given the go-ahead for the indictment never arrived**

- she [McKenzie] was advised by Ted Greenberg, acting head of Fraud section of D.O.J. that it is necessary to investigate further - "presumably to check on the possible co-responsibility of the bank"

- U.S. lawyers are working with Bill Hendricks (King & Spalding) head of Fraud Section at DOJ until 8/4/89

- Fraud section advocating theory of co-responsibility of BNL General Management

- "basic impression is that the situation seems to be sliding from the original technical-legal context to a more markedly political one. Under these circumstances we cannot preclude the affair evolving toward solutions outside the Justice system.

3/6/90 *Italian Prime Minister Andreotti meets with President Bush*

Italian Prime Minister Andreotti meets with U.S.A.G. Thornburgh

3/9/90 *Alan Raul briefs Nicholas Rostow of the National Security Council "regarding information from Justice on Iraq via secure telephone."*

3/12/90 *Alan Raul meets with McKenzie, officials from main Justice and Kevin Brosch regarding Iraq.*

3/13/90 *Alan Raul speaks with Jay Bybee in White House counsel's office "via secure telephone regarding*

information from Justice concerning Iraq".

One week later, the officials of BNL expressed their concern, not about their image, but about the prosecutorial swing towards a belief in "BNL guilt". Interestingly, the Italian Ambassador to the United States proceeded to meet with the highest ranking officials of the Department of Justice, no doubt re-emphasizing BNL's "image" anxiety.

3/13/90	**Divito:** "By now, it is clear that the Department of Justice has serious reservations about the preliminary conclusions reached by the local U.S. Attorney. These reservations apply especially to the exclusion of BNL guilt in the affair..."
3/17/90	***Ambassador Petrignani meets with reps. of DOJ to discuss BNL matter***
	- Robin Ross, Edward Dennis & Mark Richards
3/20/90 - 3/22/90	Urgenson and Clark meet in Atlanta to discuss role of BNL-Rome
	- Urgenson meets with reps of Fed. Reserve to review results of 8/89 examination of BNL(A)
3/21/90	**Divito:** - Driver calls - reported on the "first results of the meetings between ...McKenzie and the officials of the Justice Department in Washington..."
3/21/90	***Italian Ambassador Petrignani tells Thornburgh that indictment of BNL-Rome would "add insult to injury"***

Concerns as to how BNL might be "perceived notwithstanding", the bank was next told that their stoutest ally, McKenzie, was having reservations about the "innocence" of the bank. What would the government posit was the reason for the ensuing political activity? BNL-Rome had been told that there were grounds to "co-indict" the bank; their articulated response was to take "advantage of access at political levels." To do what? No amount of disingenuous posturing can evade the simple truth - the Italians lobbied the American Executive Branch in order to avoid indictment of BNL - no more, no less.

3/22/90 **Divito:** Kirwan called - McKenzie "has decided that there are elements on which to co-indict the Bank, after reading the inspection report from the Federal Reserve of Atlanta..."

- she requested delivery of Bank of Italy report

3/23/90 **Divito:** "It is evident that the strategy of cooperating with the Assistant U.S. Attorney is losing its value. The one already launched of taking advantage of access at political levels appears more promising, given the substantial change in the picture.."

3/27/90 ***Petrignani meets with Abraham Sofaer, Legal Adviser to State Department.***

Memo from Ray Rukstele to Gerrilyn Brill
- reflects Rukstele conversation with Larry Urgenson of March 22

- Urgenson felt investigation was not complete and that McKenzie conclusions regarding BNL were not substantiated

3/30/90	Bank of Italy sends its investigative report to Fed. Reserve - concludes possibility that management of BNL may have known of BNL(A) - concludes that monitoring procedures were inadequate
4/4/90	**Divito:** he and other from BNL meet with Griffin Bell and Bill Hendricks of King & Spalding - also met with Petrignani who debriefed them regarding his meetings w/State and Justice Dept. officials **Divito:** he and others from BNL meet with William Rogers, Roger Clark and David Whitescarver of Rogers & Wells, Hendricks, Driver, and Petrignani
4/6/90	**Divito:** he and Kirwan meet with McKenzie and Wade.
4/12/90	Therese Barden tells Art Wade and Bob Kennedy of the Federal Reserve that Drogoul told her Florio had authorized the excess loans to Iraq.
4/18/90 - 4/22/90	U.S.D.A. and C.C.C. visit Baghdad as part of review of BNL involvement in C.C.C. program - Kevin Brosch meets Wafai Dajani at cocktail party Dajani tells him BNL-Rome had known all about Drogoul's activities and had authorized loans to Iraq
4/23/90	McKenzie submits prosecution theory memo to DOJ - shows intent to prosecute Drogoul, Fiebelkorn, Barden, Decarolis, New and Pierre Drogoul, as well as Entrade and 6 Iraqis

- details 2 phases to investigation

- re-emphasizes Rome as victim

5/2/90 Urgenson memos file that BNL's presentation during investigation, marked by "manipulation and self-protection"

5/9/90 Clark memos Urgenson - criticizes McKenzie's 4/23/90 prosecution memorandum

The foregoing exemplified the growing efforts of Lawrence Urgenson and Peter Clark to undo the passivity and inattention of the Task Force investigation as it pertained to the complicity of BNL-Rome. Clark reviewed the Federal Reserve Bank report, and directed it to McKenzie's attention, who, amazingly, had not seen it since it August 31, 1989 release. He also minimized the investigative efforts embodied in McKenzie's "prosecution memorandum." Urgenson observed that BNL's submissions in support of their position was marked by "manipulation and self-protection". BNL countered by employing the services of William Rogers, Griffin Bell, and William Hendricks, all formerly high-placed (and high-powered) members of the Executive Branch.

On May 29, 1990, McKenzie and other members of the Task Force met with members of the State Department and the National Security Council[14]. Undoubtedly, the government would argue, the agenda was

[14] It should be noted that the NSC is regarded by many as the most powerful entity in the Executive Branch, accountable only to the President. The direct contact between this powerful executive entity and the lead prosecutor of a domestic criminal case so troubled

limited to the tarnishing of BNL's "image" by the Department of Justice, or the "repercussions" on BNL's business in the event of an indictment, a subject which seemingly by this point had been exhausted. In any event, the very next day, attorneys for BNL called the bank and informed them that according to McKenzie, "they were no longer a target of indictment..." The day after, Joe Whitley was sworn in as the United States Attorney for the Northern District of Georgia.

5/29/90	*Reps. from DOJ and Task Force meet with State Dept. and National Security Council officials, including Nicholas Rostow, Special Assistant to Bush.*
5/30/90	**Divito:** Driver called - McKenzie told Kirwan that BNL "is **no longer a target of indictment**, so long as the Italian magistrate does not intend to prosecute it"
6/1/90	*Joe Whitley sworn in as acting U.S. Attorney for the Northern District of Georgia - had been appointed by Attorney General* *- verbally recuses self from BNL case*

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the Senate Select Committee on Intelligence that they concluded:

> The Attorney General should adopt new policies and procedures to insulate prosecutors and investigators from the political process. Main Justice should take the responsibility for dealing with political officials or representing the Department with respect to political decisions rather than exposing those who are making decisions regarding the investigation and prosecution of the case to such discussions.

SSCI Report, p. 39.

The government has repeatedly accused us of reading conspiracies between the lines of the facts of this case. Yet no exhorting of invective can dispel the hard reality that in sixty days, without the benefit of additional investigation, amidst political pressure exerted at the highest levels, the doubts as to BNL's "innocence" were made to vanish, as if they had never been extant. Urgenson's assessment of BNL's manipulative, self-serving "cooperation", articulated as revelation only three weeks earlier, was dispelled, seemingly cast aside by political expediency. The compelling conclusions of the Federal Reserve and Bank of Italy reports were somehow reconciled with McKenzie's "victim" theory. The vocal cynicism of Clark and Urgenson continued, but apparently, after May 30, 1990, no one was listening.

The government argues that all involved have denied the exertion of any political pressure, and recites the truism that there is no overt evidence of political coercion. We would hardly expect such documentation to exist, or that any prosecutor would admit to having acquiesced to improper considerations. We do believe that the evidence is compelling that the investigation was directed away from Drogoul's lack of culpability to an ultimate assessment that he singlehandedly masterminded the $5 billion fraud of an enormous and sophisticated international bank. We further contend that the reasons for this slant were a combination of the personal and the political, the latter having its most dramatic impact when the investigation was "BNL as victim" theory was at its very weakest.

Moreover, the reality of political coercion and manipulation, difficult to prove, may be immaterial. Certainly the facts as we have set them forth documenting the leaks and divulged confidences, the improper counsel of a target by a prosecuting attorney, the immersion of political actors into the midst of the investigation, the clear conflict inherent in the choice of Joe Whitley, and the intentional suppression of evidence, all bear the appearance of impropriety. The court must ensure that a specifically identifiable appearance of improper conduct does not undermine the public's confidence in the judicial system and the legal profession. Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 729 (11th Cir. 1988). The court must apply a two-prong standard in such an assessment. First, there need not be proof of actual wrongdoing. Rather, there must be "a reasonable possibility that some specifically identifiable impropriety did occur." Waters v. Kemp, 845 F.2d 360, 266 (11th Cir. 1988). The court must also find that the "likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case." Id. We submit that we have exceeded the requisite showing for the first standard, having specifically identified numerous improprieties which are likely to have occurred. We find it difficult to conjure the image of a reasonable, objective individual whose confidence in the integrity of the government would not be undermined by the facts as we have set them forth herein. Ms. McKenzie's role in the prosecution of this case, now admittedly constrained, is vastly overwhelmed by the

pall of suspicion and doubt that her conduct throughout has created. Accordingly, we believe that a proper application of the appropriate standard compels her disqualification.

4. The Intentional Nondisclosure of Exculpatory Material

We discussed this matter at some length in our initial motion. Needless to say, the government has still not furnished the notes and reports of the debriefings and interviews of Paul Henderson. Neither has the government expressly responded to this branch of the motion. Instead they have incorporated by obscure reference their response to the defendant's motion to compel immunity for Mr. Henderson. In that submission, they do not deny that Henderson told them of the reports of Rome's complicity, either during his 1991 debriefings or in the two 1993 interviews. Rather they assert that

> Mr. Henderson advised the government during his 1993 interview that be had no personal knowledge as to what BNL-Rome or the Italian government knew (or approved) about Drogoul's BNL-Atlanta transactions because Henderson had no contact with anyone at BNL-Rome or with any representative of the Italian government, Rather, anything that Henderson knew about whether Rome knew, he learned from Drogoul's co-conspirators.

(government memorandum in opposition to motion to compel immunity, p. 7).

At the time that Henderson was initially debriefed by McKenzie[15], and Kent Alexander, the co-conspirator status of any individual was only a state of the prosecutorial mind, since there was not yet an indictment. In any case, we know of no limitation on the government's obligation which is predicated upon the character of the source of the information. The government's strained view of their obligation would permit the withholding of facially exculpatory evidence merely because they had unilaterally decided that the declarant was not credible.

This information, which the court has twice deemed to be Brady material, was intentionally withheld from the defense because it did not comport with the central government theory of Rome's ignorance and innocence. This willful nondisclosure is entirely consistent with the pattern of impropriety and obstruction enacted by the government throughout its investigation, particularly when the focal point was BNL-Rome's complicity.

Similarly, the government withheld evidence of information related by Wafai Dajani, another key figure in the events which lay at the heart of this indictment. The government did disclose this information to Judge Lacey, albeit in a different context.

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[15] Although the government maintains that Ms. McKenzie was not present, Mr. Henderson's affidavit contradicts this assertion. In addition, the scope of McKenzie's participation in this investigation makes her absence during the debriefing of an important witness from Matrix Churchill extremely unlikely.

> In April 1990, a USDA attorney, Kevin Brosch, was in Baghdad, presumably investigating irregularities in the CCC program. Brosch met Dajani at a cocktail party, and Dajani apparently told Brosch that BNL-Rome had known about Drogoul's activities and had authorized the loans to Iraq.

(Lacey Report, Appendix, Vol. I. p. 97)

This information was <u>never</u> disclosed by the government to any defense attorney, despite persistent requests (and court orders) that material relative to knowledge of BNL-Rome be furnished to the defense. Presumably, the government's response would be, as it was to Judge Lacey, that:

> [t]his claim [Dajani's re: Rome] was, of course highly self-serving. Dajani had every personal and professional interest in seeing that this view of the facts was adopted, because if BNL-Rome knew about and authorized Drogoul's loans to Iraq, then presumably neither Dajani nor the Iraqis had acted criminally.

(Lacey Report, Appendix, Volume I, P. 97, fn. 55)

This is to be contrasted, no doubt, with the altruism of BNL-Rome in their denials of complicity, and their unleashing of a massive political effort when those protestations were called into question.

What emerges from these nondisclosures is the picture of a willful effort to insulate the theory of BNL's victim status from the attacks this material would facilitate. It is an extension of the initial improprieties which favored this theory, and the inevitable consequence of the political power exercised to ensure that no other prosecution course could prevail.

We have documented a wide range of misconduct and improprieties. We have asserted that the path to nonprosecution of the defendant was marred by personal and political prejudice, and the search for the truth obstructed by a variety of prosecutorial indiscretions. While we originally sought the appointment of an independent counsel, we are constrained to concede that no such remedy now exists. The **Brady** violations, while willful, have been revealed prior to trial, thus affording the defendant no constitutional redress. Therefore, we seek dismissal of this indictment based on the inherent supervisory power of this court.

The supervisory power doctrine "is designed and invoked primarily to preserve the integrity of the judicial system" and "to prevent the federal courts from becoming accomplices to government misconduct." United States v. Omni International Corp, 634 F. Supp.1414, 1438 (D. Md. 1986); United States v. Payner, 447 U.S. 727, 744, 100 S. Ct. 2439, 2451 (1980); United States v. Noriega, 746 F. Supp. 1506, 1535 (S.D.Fla. 1990). This inherent power is a judicial vehicle to deter conduct and rectify injustices which are neither constitutional nor statutory violations, "but which the court finds repugnant to fairness and justice and is loath to tolerate." United States v. Noriega, 746 F. Supp. at 1535. See also United States v. Leslie, 783 F.2d 541, 569 (5th Cir. 1986). The Supreme Court has repeatedly exercised its supervisory power to curtail improper practices by federal attorneys. United States v. Hale, 422 U.S. 171, 180, 95 S. Ct. 2133, 2138 (1975); Grunewald v.

United States, 353 U.S. 391, 422, 77 S. Ct. 963, 983 (1957). In its essence, the sole common denominator of the invocation of the supervisory power is a desire to maintain and develop standards in the federal courts more exacting than the minimum constitutional requirements of due process. See generally Note, "The Judge-Made Supervisory Power of the Federal Courts, 53 Geo. L.J. 1050 (1978).

The crafting of the concept of the judicial supervisory power was inextricably linked to the notion of the federal prosecutor's obligation to serve the cause of justice in the federal criminal system. United States v. Leslie, 759 F.2d 366, 372 (5th Cir. 1985). As the Supreme Court stated in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935):

> The United States Attorney is a representative not of an ordinary party to the controversy, but of a sovereignty whose **obligation to govern impartially is as compelling to govern at all**; and whose interest, therefore, in a criminal prosecution **is not that it shall win a case, but that justice shall be done**. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, **he is not at liberty to strike foul ones**. It is as much his duty to **refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one**.

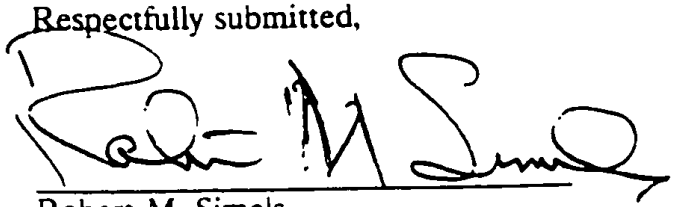
(emphasis added).

We submit that the multitude of sins documented above bespeak a betrayal

of this eloquent mandate. From its inception, the investigation was slanted away from uncovering the truth of BNL's complicity, thus isolating the defendant in an irrational theory of lone culpability. Once chosen this course was protected by ethical breaches, political maneuvering and the willful suppression of evidence. As a grievous violation of the basic tenets of fairness and justice, this cannot and should not be countenanced. We therefore beseech the court to invoke its supervisory authority and dismiss[16] the indictment against the defendant.

WHEREFORE, based upon the foregoing, we respectfully request this court to dismiss the indictment against the defendant and to disqualify Assistant United States Gale McKenzie from further participation in the investigation and prosecution of this indictment.

Respectfully submitted,



Robert M. Simels
Attorney for Christopher Drogoul

ROBERT M. SIMELS, P.C.
260 Madison Avenue
New York, New York 10016
(212) 679-8700
0433

[16] We recognize that much of our argument rests on factual assertions. While these have largely gone unchallenged by the government, we cannot ignore the possible need for a fact-finding hearing on this motion. As such, we eagerly seek such a forum for the adjudication of the issues raised herein.

CERTIFICATE OF SERVICE

This is to verify that I have this day served counsel for the opposing party in the foregoing matter with a copy of Defendant's Memorandum of Law in Support of His Amended Motion to Dismiss The Indictment by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon addressed to:

AUSA, Howard Heiss, Esq.
BNL Task Force
United States Attorney's Office
Department of Justice
Richard Russell Federal Building
Box 5
Atlanta, Georgia 30303

This 21st day of July, 1993.

ROBERT M. SIMELS
Attorney at Law

260 Madison Avenue
22nd Floor
New York, New York 10016
(212) 679-8700